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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RUBEN MACIEL, Defendant and Appellant.	H037083 (Santa Clara County Super. Ct. No. C1105649)

Defendant Ruben Maciel was convicted by negotiated plea for unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a), with a prior conviction for the same offense. (Pen. Code § 666.5.)[1] The crime was committed on April 21, 2011. At sentencing on June 24, 2011, the court suspended sentence, consistently with the bargain, granting three years probation and imposing a 10-month county-jail sentence. The court also imposed, over objection, specified gang conditions based on defendant's prior juvenile history that included gang involvement and the fact of his gang tattoos. As part of sentencing, defendant was awarded 37 days of pre-sentence credits based on 25 actual days and 12 days of conduct credits under the then-current version of section 4019.

Defendant challenges the imposition of gang conditions as part of probation. He contends that these conditions were improperly imposed because as applied to him, they

[1] Further unspecified statutory references are to the Penal Code.

are not reasonably related to future criminality and thus violate *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*). He also contends that principles of equal protection compel an award of additional conduct credits under the current version of section 4019, which expressly applies only to defendants whose crimes were committed on or after October 1, 2011. (§ 4019, subd. (h).) Alternatively, he contends that equal protection principles entitle him to additional conduct credits under the version of section 2933 in effect when he committed his crime and was sentenced, which was more generous than the version of section 4019 under which his conduct credits were calculated. We reject these claims and affirm the judgment, modified, as both sides agree, to correctly reflect the specific gang conditions actually ordered by the court in its oral pronouncement of sentence. We further modify the clerk's minutes to reflect 37 days of pre-sentence credit, as the court awarded, rather than the 47 days reflected in the minute order.

STATEMENT OF THE CASE

On April 21, 2011, Maciel, acting alone and while on probation, took a truck belonging to another, without the owner's consent and with the intent to permanently deprive the owner of the truck.[2]

Maciel was charged by felony complaint in count one with vehicle theft with a prior conviction (Veh. Code § 10851, subd. (a); § 666.5), and in count two with burglary of a vehicle. (§§ 459-460, subd. (b).) On May 10, 2011, Maciel pleaded guilty to count one and admitted the prior conviction under a negotiated disposition. At sentencing on June 24, 2011, and per the plea bargain, the court suspended imposition of sentence, placed Maciel on probation for three years, imposed a 10-month term in county jail, and dismissed count two. The court awarded 25 days of actual custody credits and 12 days of

[2] We take the facts from the complaint as they are not relevant to the issues on appeal and because defendant waived a full probation report, which might otherwise contain a fuller recitation.

conduct credit[3] under the version of section 4019 then in effect, and imposed various fines and fees.[4]

Per the recommendation of the waived referral report, the court also imposed, among other conditions, gang conditions of probation. These were that Maciel: (1) "not possess, wear or display any clothes or insignia, tattoo, emblem, button, badge, hat, cap, scarf, bandana, jacket or other article of clothing that he knows or the probation officer informs him is evidence of affiliation with or [membership in] a criminal street gang"; (2) "not associate with a person he knows [to be] or the probation officer informs him is a member of a criminal street gang"; (3) "not visit or remain in any specific location which he knows to be or which the probation officer informs him is an area of criminal street gang activity"; (4) "not be adjacent to any school[] campus during school hours unless he's enrolled or with prior permission of school administration or probation"; (5) "not be present at any court proceeding where he knows or [the] probation officer informs him [that] a member of a criminal street gang is present or [in which] the proceeding concerns a member of a criminal street gang unless he is a party, [is] a defendant in a criminal proceeding or is subpoenaed as a witness or has prior permission of the probation officer."[5]

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[3] The court's oral pronouncement accordingly reflected 37 days of credit. But the clerk's minutes reflect 47 days of credit, which, as noted, we perceive as a clerical error that we will correct by modification in our disposition.

[4] Defendant also admitted that the offense to which he pleaded guilty constituted a violation of his probation, a separate offense. The court reinstated probation for that violation, "coterminous" with probation for the vehicle theft.

[5] The clerk's minutes include an attachment reflecting "gang orders" as conditions of probation but as stated, these conditions do not reflect what the court orally pronounced. They also violate various principles established in case law concerning constitutional overbreadth and vagueness in gang probation conditions. (See, e.g., *In re Vincent G.* (2008) 162 Cal.App.4th 238, 245 [modifying non-association condition to

These gang conditions were recommended by the waived referral report based on a confidential juvenile memo. The memo said that according to information in defendant's juvenile probation history, he "has" associations with the Norteno criminal street gang. He had been arrested in 2008 and based on his gang ties and ties to a graffiti crew, "full gang conditions were ordered." Shortly thereafter, he was involved in a fight in juvenile hall with a rival gang member. Juvenile hall staff then noted that he "continued to taunt rival gang members and was unreceptive towards counsel and change." He also was noted to have at one point worn blue San Jose Sharks attire and a shirt with the number "14." During another custodial commitment, staff noted he "had a high regard for the Northern way of life and gang culture." He was advised by juvenile staff that his gang ties "would need to subside" in order for him to be successful.

Maciel's attorney objected to the imposition of gang conditions at sentencing, arguing that the vehicle theft was not gang related and that Maciel was not subject to probationary gang conditions when he committed it. About the matters referenced in the confidential juvenile memo, counsel argued that they dated back to 2008 and were thus remote in time to the crime for which Maciel had pleaded guilty and was being sentenced. Moreover, Maciel had been released from juvenile probation with gang conditions about a year before this offense. Probation offered that although gang conditions had been initially imposed in 2008, they had later been "upgraded" in 2009. The court inquired about Maciel's last known gang activity, which was apparently in 2009, and whether he had gang tattoos, which had already been determined affirmatively by probation. Based thereon, the court decided to impose the gang conditions but noted that if defendant had his tattoos removed, the court "would be glad to delete those orders."

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include knowledge element]; *People v. Leon* (2010) 181 Cal.App.4th 943, 952 [modifying condition using term " 'frequent' " due to overbreadth].)

Maciel timely appealed, challenging the sentence or matters occurring after the plea but not affecting its validity. (Cal. Rules of Court, rule 8.304(b).)

DISCUSSION

I. *The Court Did Not Abuse Its Discretion by Imposing Gang Conditions*[6]

Defendant challenges the imposition of gang conditions of probation on the basis that they require or forbid conduct that is not reasonably related to future criminality, meaning there is an insufficient nexus between the prohibited conduct and the goal of deterring future criminal conduct on his part.

" 'The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.] The primary goal of probation is to ensure "[t]he safety of the public … through the enforcement of court-ordered conditions of probation." (Pen. Code § 1202.7.)' [Citation.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) Trial courts have broad discretion under section 1203.1 to impose probation conditions in order to "foster rehabilitation and to protect public safety." (*People v. Carbajal* (1998) 10 Cal.4th 1114, 1120.) But, generally, " '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality … ." [Citation.]' (*Lent, supra*, 15 Cal.3d at p. 486.) This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct which is not itself criminal, the condition is valid as long as [it] is

[6] We reject at the outset respondent's contention that Maciel forfeited his objection to gang conditions based on a lack of nexus to future criminality. Maciel's objections to gang conditions asserted below were broadly enough stated under *People v. Welsh* (1993) 5 Cal.4th 228, 234-237, to encompass this ground.

reasonably related to preventing future criminality. [Citation.]" (*Olguin, supra*, 45 Cal.4th at pp. 379-380.) We review conditions of probation for abuse of discretion. (*Id.* at p. 379.)

Maciel posits that the first two prongs of the above *Lent* test are satisfied here, so that the only issue is whether the third prong—relating to the prohibition of conduct not reasonably related to future criminality—is also met. He contends that this prong is met here too because there is an "insufficient nexus between the prohibited conduct and the goal of deterring criminal conduct by" him. The nexus is insufficient, he argues, because the only showing of his gang-related conduct pre-dates the offense by two to three years and there was no affirmative indication of his continued or current gang activity or association.

Maciel contends that the "age and lack of currency of the alleged gang affiliation" in this case distinguishes it from *People v. Lopez* (1998) 66 Cal.App.4th 615 (*Lopez*). There, gang conditions were upheld after a conviction for vehicle theft based on information in the probation report about Lopez's admitted gang membership, young age (20), lengthy history of juvenile offenses and misdemeanor adult crimes, and consistent and increasing pattern of criminal behavior. (*Id.* at p. 626.) Based on these factors, the trial court concluded that his "disassociation from gang-connected activities was an essential element of any probationary effort at rehabilitation because it would insulate him from a source of temptation to continue to pursue a criminal lifestyle," thus serving to prevent future criminality. (*Ibid.*) The probationary restrictions on his contact with gang members were accordingly upheld as being legitimately related to this end because (1) association with gang members is the first step of involvement in gang activity; (2) the associational restriction insured that Lopez would not be present at confrontational situations between rival gangs; and (3) hostility among different gangs is often an underlying cause of criminal activity. Likewise, the restriction on Lopez's display of gang indicia was reasonable because it "removed from [him] the visible reminders of his

past gang connection. [Citation.]" (*Ibid*.) The court of appeal upheld these gang conditions because, under the circumstances, they "promoted section 1203.1's goals of rehabilitation and public safety by forbidding conduct reasonably related to future criminality." (*Lopez, supra,* at p. 626.)

But we are not convinced about the proffered distinctions between this case and *Lopez*. In both cases, the probation reports documented gang affiliation and association, a history of juvenile offenses escalating into adult criminality, and the similar age of the defendants.[7] Maciel argues that Lopez's gang ties as reflected in the probation report were current, whereas his own are in the past. But the opinion in *Lopez* states that the defendant there " '*is* a self-admitted gang member and *claims* "Norteno." ' " (*Lopez, supra*, 66 Cal.App.4th at p. 622, italics added.) Similarly, the record here says that Maciel "*has* associations with the Norteno criminal street gang." (Italics added.) There is no temporal difference between these two descriptions; they both describe gang affiliations in the present tense.

Further, Maciel's juvenile and criminal history suggests that, like the defendant in *Lopez*, his prior offenses were gang-related and also involved drugs. Moreover, the probation report here documented that Maciel's gang affiliations negatively affected his behavior even in the structured environment of juvenile hall. And here, as in *Lopez*, Maciel has gang tattoos. Although Maciel's last documented gang activity was in 2008, some three years before the current offense for which he was convicted, there had apparently been a need to "update" his juvenile gang conditions in 2009. Maciel contends in conclusory fashion that his gang involvement as reflected in this record is "stale" but he does not articulate how or why this is so. As we see it, in the larger context, two to three years since his documented gang involvement is not as remote in

[7] Maciel was 19 years old when he committed the vehicle theft.

time as he suggests when it comes to deterring future criminality, particularly where the record does not affirmatively dispel his current gang affiliation.

In sum, as in *Lopez*, under the circumstances presented here, the challenged gang conditions imposed by the trial court are reasonably related to the avoidance of future criminality. Thus, the third prong of the three-part *Lent* test is not satisfied, and we will accordingly not invalidate the challenged gang conditions of probation.

II. *We Will Modify the Minute Order to Reflect the Gang Conditions Actually Imposed*

As noted, the attachment to the minute order showing gang conditions of probation does not reflect what the court actually directed and it contains wording that has been determined to be constitutionally infirm. Maciel contends that if we uphold the gang conditions, as we are, the order should be modified to reflect exactly what the court orally pronounced. Respondent concedes the point. (*People v. Mesa* (1975) 14 Cal.3d 466, 471, superseded by statute on other grounds as stated in *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1415-1416 [general rule is that court's oral pronouncement of sentence controls over discrepancy with clerk's minutes].) Accordingly, our disposition will reflect this modification.

III. Maciel is Not Entitled to Additional Conduct Credits

Maciel contends, on two different grounds, that principles of equal protection entitle him to additional conduct credits. The first of these contentions is that the statutory changes to section 4019, operative October 1, 2011, apply retroactively so as to entitle Maciel to one-for-one conduct credits rather than the one-for-two he was awarded under the prior version of section 4019. The second contention is that Maciel is entitled to one-for-one custody credit even without resort to the October 2011 changes to section 4019 because that amount of conduct credit was available under prior law via section 2933 to persons similarly situated to Maciel but who received a prison sentence

after serving time in county jail rather than probation, as he did. We address these contentions in turn.

A. *Retroactivity of October 2011 Amendments to Section 4019*

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by an inmate's good behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. (Stats. 1982, ch. 1234, § 7, p. 4554 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 in an extraordinary session to address the state's ongoing fiscal crisis. Among other things, Senate Bill No. 3X 18 amended section 4019 such that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before except for those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].) These amendments to section 4019 effective January 25, 2010 did not state whether they were to have retroactive application.

California courts subsequently divided on the retroactive application of the amendments to section 4019, effective January 2010, and the issue currently remains pending with the California Supreme Court for resolution. (See *People v. Brown* (2010)

182 Cal.App.4th 1354, rev. granted June 9, 2010, S181963, and related cases.)[8] Then, effective September 28, 2010, section 4019 was amended again to restore the pre-sentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits. (Stats. 2010, ch. 426, § 2.) By its express terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to inmates confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only. (Stats. 2010, ch. 426, § 2.)

This brings us to legislative changes made to section 4019 in 2011, as relevant to Maciel's first equal protection challenge. These statutory changes, among other things, reinstituted one-for-one conduct credits and made this change applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only.[9] (§ 4019, subds. (b), (c), & (h).) Maciel committed the crime in the instant case on April 21, 2011, with sentencing two months later, and the trial court properly awarded him conduct credits on the basis of the law then in effect, i.e., that version of section 4019 operative after September 28, 2010 and before October 1, 2011.

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, are to have prospective application only, Maciel contends, on equal protection grounds, that he is entitled to the reinstituted one-for-one conduct credits

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[8] Our own view is that the January 2010 amendments to section 4019 were not retroactive, even in the face of an equal protection challenge analytically akin to that mounted here. (See, *People v. Hopkins* (2010) 184 Cal.App.4th 615, 627-628, review granted June 21, 2010, S183724 [briefing deferred pending decision in *People v. Brown*, *supra*].)

[9] These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

implemented by those changes.[10] He argues that *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) compels this result, contending that it held "that a new statute that provides for presentence credits for prison inmates must be retroactively applied to all inmates." He also cites *People v. Sage* (1980) 26 Cal.3d 498, 507-508 (*Sage*), and urges that it implicitly held "that felons were similarly situated to all other jail inmates" and that the "then-applicable version of section 4019 violated equal protection because it denied conduct credit to felons who were sent to prison" while making such credits available to other jail inmates.

Preliminarily, to succeed on an equal protection claim, a defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. In considering whether state legislation is violative of equal protection, we apply different levels of scrutiny to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) Where, as here, the statutory distinction at issue neither "touch[es] upon fundamental interests" nor is based on gender, there is no equal protection violation "if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].) Under the rational relationship test, " ' " 'a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there

[10] Respondent contends that Maciel has forfeited this argument for his failure to have raised it below. We exercise our discretion to reach the merits because the current version of section 4019 that Maciel argues should apply was not yet operative through the date that he was sentenced.

are "plausible reasons" for [the classification], "our inquiry is at an end." ' " ' " (*Hofsheier, supra,* at pp. 1200-1201, italics omitted.)

In *Kapperman,* the Supreme Court reviewed a provision (then-new § 2900.5) that made actual custody credits prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*Kapperman, supra,* 11 Cal.3d at pp. 544-545.) The court concluded that this limitation violated equal protection because there was no legitimate purpose to be served by excluding those already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) But *Kapperman* is distinguishable from the instant case because it addressed *actual* custody credits, not *conduct* credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served.

Sage is likewise inapposite, because it involved a prior version of section 4019 that allowed pre-sentence conduct credits to misdemeanants, but not felons. (*Sage, supra*, 26 Cal.3d at p. 508.) The high court found that there was neither a "rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons." (*Ibid*., fn. omitted.) But here, the purported equal protection violation is temporal, rather than based on defendant's status as a misdemeanant or felon. (*People v. Floyd* (2003) 31 Cal.4th 179, 189-191 [" 'punishment-lessening statutes given prospective application' " on a certain date " 'do not violate equal protection' "].) One of section 4019's principal purposes is to motivate or reward good behavior while in pre-sentence custody, and it is impossible to influence behavior after it has occurred. The fact that a defendant's conduct cannot be retroactively influenced provides a rational basis for the Legislature's express intent that the October 2011 amendments to section 4019 apply prospectively. (*In re Stinette* (1979) 94 Cal.App.3d 800, 805-806 [prospective only application of provisions of Determinate Sentencing Act (§ 1170 et seq.) upheld over equal protection challenge] ; *In re Strick* (1983) 148 Cal.App.3d 906,

912-913 [prospective only application of statutory changes designed to incentivize productive work and good conduct of prison inmates upheld over equal protection challenge].)

We accordingly reject Maciel's contention that he is entitled to additional conduct credits based on amendments to section 4019, operative October 1, 2011.

B. *Section 2933 Versus Section 4019*

On an alternative basis, Maciel raises a second equal protection challenge, based on the different rates of conduct credit awarded to him under the version of section 4019 in effect when he committed his crime and the more generous rate that was then available to defendants receiving a prison sentence under the version of section 2933 then in effect. (former § 2933, subd. (e)(1).)

Maciel's challenge is premised on versions of section 2933 and 4019 that were in effect when he committed his crime and was sentenced in April and June 2011, respectively. Yet he did not raise this equal protection challenge below and the trial court consequently was not given the opportunity to rule on it. Respondent contends that this failure has resulted in the argument being forfeited or waived on appeal. Maciel did not respond to this contention in his reply brief. We conclude that the claim is indeed forfeited.

" ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731.) The purpose of the forfeiture doctrine " 'is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

Our high court has applied the doctrine of forfeiture in a variety of contexts to bar claims not preserved in the trial court in which the appellant had asserted an abridgement of fundamental constitutional rights. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 250 [forfeited objection that admission of gang paraphernalia violated defendant's associational rights]; *People v. Padilla* (1995) 11 Cal.4th 891, 971, disapproved on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [due process claim forfeited where defendant failed to request instruction and there was no sua sponte duty to instruct]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20 [due process, fair trial, reliable guilt determination claims concerning admissibility of a videotape forfeited in a capital case]; *People v. Garceau* (1993) 6 Cal.4th 140, 173 [claims based on constitutional rights to fair trial and equal protection in connection with jury selection forfeited]; *People v. Ashmus* (1991) 54 Cal.3d 932, 972–973, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [self-incrimination, cruel and unusual punishment, and due process claims forfeited].) Courts in a number of instances have found that the appellant's unpreserved equal protection claims, such as the one made by defendant here, were forfeited. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14 [claim that denial of motion to exclude testimony based upon possible hypnosis of witness violated equal protection forfeited]; *People v. Burgener* (2003) 29 Cal.4th 833, 861, fn. 3 [claim that practice of supplementing jury panels with additional minority prospective jurors violated equal protection forfeited]; *People v. Carpenter* (1997) 15 Cal.4th 312, 362, superseded by statute on other grounds as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096 [claim that denial of severance motion violated equal protection forfeited]; *People v. Sumahit* (2005) 128 Cal.App.4th 347, 354, fn. 3 [claim that departmental practice of not recording SVP interviews violated equal protection forfeited]; *People v. Hall* (2002) 101 Cal.App.4th 1009, 1024 [claim that interpretation of statute authorizing AIDS testing violated equal protection forfeited].)

As is clear from the record, Maciel's claim that the court's award of conduct credits under section 4019 instead of the more generous section 2933 violated his rights to equal protection was not raised below. Further, Maciel raises no arguments that we should reach the merits in spite of his failure to preserve the claim. We are not inclined to exercise any discretion to do so under these circumstances. Accordingly, like other unpreserved equal protection challenges, we conclude that Maciel's claim cannot be maintained on appeal. (*People v. Alexander*, *supra*, 49 Cal.4th at p. 880, fn. 14; *People v. Burgener*, *supra*, 29 Cal.4th at p. 861, fn. 3.)

DISPOSITION

The judgment is modified in the following respects. The "gang orders" as set forth in the clerk's minute order (at clerk's transcript p. 18) are stricken. The following conditions of probation are substituted: "Defendant must: (1) not possess, wear or display any clothes or insignia, tattoo, emblem, button, badge, hat, cap, scarf, bandana, jacket or other article of clothing that he knows, or the probation officer informs him is, evidence of affiliation with or membership in a criminal street gang; (2) not associate with a person he knows to be, or the probation officer informs him is, a member of a criminal street gang; (3) not visit or remain in any specific location which he knows to be, or which the probation officer informs him is, an area of criminal street gang activity; (4) not be adjacent to any school campus during school hours unless he is enrolled at the school or has the prior permission of the school administration or the probation officer; (5) not be present at any court proceeding where he knows, or the probation officer informs him, that a member of a criminal street gang is or will be present or in which the proceeding concerns a member of a criminal street gang, unless he is a party, is a defendant in a criminal proceeding, or is subpoenaed as a witness or has prior permission of the probation officer." The judgment is further modified to reflect an award of 37 days of conduct credit, and not 47 days as stated in the clerk's minutes. As so modified, the judgment is affirmed.

Duffy, J.[*]

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.

[*] Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.